82-1190

Supreme Court, U.S.
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ALEXANDER L. STEVAS
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No. _____

Supreme Court of the United States

October Term, 1982

Stillwater Condominium Association,

Petitioner,

–vs–

American Home Assurance Company
and
Fireman's Fund Insurance Company,

Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For The Ninth Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit Memorandum Opinion is so deficient as to require review by this Court.

2. Whether the construction placed upon the policy provisions is contrary to prior Ninth Circuit interpretation and the interpretation of other Federal and State Courts.

3. Whether the insurance industry is so infused with overriding public responsibility as to require a definitive construction of oft litigated and divergently interpreted standard policy provisions.

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LIST OF ALL PARTIES IN THE COURT BELOW

All parties in the Court below are listed in the caption. Stillwater Condominium Association was substituted for the original parties, Big Sky of Montana, Inc. and Chrysler Realty Corporation, in the Trial Court proceedings and is itself an association with 60 unit members. A list of the Stillwater unit owners as contained in the Certification required by the Rules of the Ninth Circuit Court of Appeals is reproduced, by reason of length, in the Appendix. (Appendix vi)

OPINIONS BELOW

The Opinion of the District Court is reported at 508 F.Supp. 1075 (D.Mont.1981). The Opinion of the Court of Appeals is unreported. Both Opinions together with the original judgment appear in the Appendix hereto.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 6, 1982. A timely petition for rehearing was de-

nied on October 21, 1982, (Appendix iv) and this Petition for Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

1. THE FACTUAL BACKGROUND.

In the early 1970's the late Chet Huntley envisioned a resort area in his native Montana which reached fruition, with the aid of Chrysler Realty Corporation, as Big Sky of Montana, Inc. The master plan included skiing, golfing and other recreational areas complete with a hotel - commercial complex and a number of condominiums located near the skiing and golf facilities. Stillwater was conceived as a complex of four buildings to be located adjacent to the hotel - commercial complex near the ski lifts.

Construction was started in early 1973 and work thereafter progressed until substantial completion was achieved in 1974. After the owners commenced to occupy their units certain defects were noticed. These included

both structural and design defects in addition to damages to interior units because of roof leaks, freezing pipes and insufficient siding.[1] Various meetings were held between Stillwater and Big Sky with no satisfactory results and the State Court litigation was ultimately filed and amended to include the insureds, Big Sky and Chrysler Realty, on October 4, 1977. (Clerk's Record 11, hereafter CR, Rochefort Affidavit at p.2)

The State Court litigation sought damages for the defective structures and Big Sky tendered the defense to the insurers which thereafter accepted the tender and participated in the preparation of pleadings and pre-trial discovery. (CR 11, Haddon Affidavit pp.2-3) As this litigation continued Stillwater twice amended the complaint and ultimately converted the State Court litigation to include a class

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1/ Stillwater Condominium Association v. American Home Assurance Company, 508 F.Supp. 1075 (D.Mont. 1981). "Just a few of the indicia of that poor construction were leaking roofs, delaminating siding, and improperly installed wiring and plumbing."

action involving all of the condominium owners. (CR 11, Exhibit 2 to Rochefort Affidavit) After participating in discovery to a point where damage to individual personal property of condominium owners was indicated, being caused by leaking roofs, frozen pipes, etc., the insurers withdrew their defense and denied coverage. (CR 11, Haddon Affidavit at p.2; CR 34 Wellcome Affidavit, Addendum A)

Substantial additional discovery was undertaken culminating in an extensive deposition of the Stillwater architect in which he detailed the various elements of damage. (CR 18, Deposition of Doug Rand) Following this deposition the case was settled in a good faith settlement which included the insureds' assigning to Stillwater all rights which they had against the insurers to recover for the amount of the settlement including costs and expenses, together with all other relief to which Stillwater might be entitled. (CR 30)

2. THE PROCEEDINGS IN THE COURTS BELOW

This case was originally filed as a De-

claratory Judgment action by the original insureds Big Sky of Montana, Inc. and Chrysler Realty Corporation, (hereafter Big Sky or insureds) to obtain a declaration of coverage under certain insurance policies written by the insurers to insure the construction of condominiums and related structures which the insureds were constructing at the Big Sky resort. (Excerpt of Record, p.1, hereafter ER) Jurisdiction was based upon diversity of citisenship, 28 U.S.C.§1332 and §2201. The declaratory judgment action resulted from the insurers' refusal to continue the defense of the State Court litigation. (Exhibit 1 to Complaint for Declaratory Judgment, CR 3(1), ER 9)

While the declaratory judgment action was pending the State Court litigation was settled with a portion of the consideration for the settlement being an assignment of the insureds' interests in the insurance policies with Stillwater being thereafter substituted as the plaintiff in the District Court. (CR 30)

The insureds originally filed a Motion for Order Specifying Facts Appearing Without Substantial Controversy (Rule 56(d)) (CR 10, ER p.35) and the insurers countered with a Motion for Summary Judgment. (CR 16, ER p.38) After Stillwater was substituted as the sole party plaintiff the Motion was converted to a Motion for Partial Summary Judgment (Rule 56(c)) (CR 18, ER p.39) and Stillwater filed a Motion to Amend to claim consequential damages. (CR 22, ER p.46) With the filing of supporting affidavits, full briefing and oral argument, the District Court granted the insurers' Motion for Summary Judgment and denied all other pending motions. Following the District Court's denial of post judgment motions, again supported by affidavit and supplemental brief, Stillwater appealed to the Court of Appeals for the Ninth Circuit which affirmed the District Court.

ARGUMENT

1. THE NINTH CIRCUIT MEMORANDUM OPINION IS SO DEFICIENT AS TO REQUIRE REVIEW BY THIS COURT.

The opinion of the Court below treats, in

a three-page per curiam opinion, one of the more complex and far reaching issues of insurance law in such a manner as to deny substantive due process to the parties. Although this case is clearly not framed within Constitutional guidelines, the opinion of the three judge panel simply does not comport with even minimal judicial construction.

While the function of this application is to show overriding public interest, the interest of the 60 unit members of the Stillwater Association deserves more than cursury treatment. As pointed out hereafter in the substantive issues, this particular question is one which has concerned State and Federal Courts for decades without substantial clarification by the insurance industry. When intermediate appellate courts are reversed by final appellate authority, coupled with divided opinions, lengthy dissents and deviations in fundamental rationale, everyone involved is entitled to a more thorough, and conscientious, treatment within the federal appeals structure.

We have recently experienced a decided downturn in the economy with devastating repercussions in the construction industry. Defunct firms, Chapter 11 proceedings and outright bankruptcies are a result of the economic subsidence. Where the constructing modality fails the only recourse is against insurance carriers which have provided insurance on the project. The insurance industry has for years relied upon the exclusionary interpretation by the ultimate numerical majority of courts without at any time adopting clear language in the policy which would allow the insured and the owners to choose between liability insurance and bonding.

In this potentially "worst of times" for a vitally significant industry which touches the lives of everyone who would own a house or business, those involved in the entire spectrum from preliminaries of construction through occupation and future manifestations of latent defects, are entitled to a comprehensive, detailed and considerate treatment of the sig-

nificant issues raised in the Court below.

Absent review by this Court, the highest pronouncement of the Federal Courts on this subject will be the clearly deficient opinion of the Ninth Circuit Court of Appeals. Substantial justice for the Stillwater owners and the potential of large involvement by the public as a whole requires a searching analysis of this far reaching problem. The lip service rendered by the Court below does not measure up to even minimal standards of appellate consideration. Such a deficiency can only be rectified by adequate appellate consideration by this Court.

2. THE CONSTRUCTION PLACED UPON THE POLICY PROVISIONS IS CONTRARY TO PRIOR NINTH CIRCUIT INTERPRETATION AND THE INTERPRETATION OF OTHER FEDERAL AND STATE COURTS.

Lengthy briefing in the Court below, including an Appellant's Reply Brief, Appellant's Additional Citations and a separate Petition for Rehearing, pointed out to the Court not only the divergence of opinion noted by the District Court but also additional authorities

in the Federal judicial structure which mandated a holding in favor of the Stillwater Condominium owners. These authorities were either totally ignored or marginally footnoted by the Court.

Prior to deciding the instant case the Ninth Circuit in 1979 decided St. Paul Fire and Marine Insurance Company v. Sears, Roebuck and Company, 603 F.2d 780 (9th Cir.1979). This basic holding is that there is coverage and the duty to defend where damage results to structures other than the insured's product. Although significant damage was alleged, such as resulting loss of rental income, and established by deposition while the insurance carriers were actively representing the insureds, this damage is passed off in the opinion of the Court below as an "isolated reference". The opinions of the Circuit Court of Appeals and the District Court fail to come to grips with a situation where active participation in the litigation yields information requiring a defense and at least partial coverage.

Other Ninth Circuit cases have held that a duty to defend arises where the complaint presents a possibility that the insured could be found liable. Previews Inc. v. California Union Ins. Co., 640 F.2d 1026 (9th Cir.1981) and the Seventh Circuit has expressly held that the insurance carrier cannot abandon the insured. Maneikis v. St. Paul Ins. Co. of Illinois, 655 F.2d 818 (7th Cir.1981) There the Seventh Circuit reversed a summary judgment in favor of the insurance carrier based in part upon a consideration of facts outside the pleadings:

> "Our inquiry, therefore, is limited to a determination of whether St. Paul wrongfully failed to defend Solotke. The propriety of St. Paul's August 1, 1978, refusal to defend requires an examination of the complaint in the underlying lawsuit as well as any facts outside the complaint which were known to the insured." (Citations omitted - 655 F.2d at 823)

Other Federal cases have reached a similar result. See Central Armature Works v. Am. Motorists, Inc., 520 F.Supp. 283 (D.Ct.D.C. 1980) Although the opinion below purports to construe Montana law as being limited to a

consideration of the pleadings, actually no Montana case has considered the precise question.[2/]

The other areas which the Court below treats in a desultory manner are denial of coverage based upon the exclusions and the conflict among the Courts as creating ambiguity per se. On the latter subject the Honorable Russell E. Smith held in Walker v. Firemans' Fund Insurance Co., 268 F.Supp. 899, 901, 902 (D.Mont.1967) as follows:

> "Had no court considered this problem, and were this a case of first impression, I would be persuaded to adopt the defendant's position and hold that the language of the policy is not ambiguous; that the unqualified use of the work 'insured' in the exclusion clause includes both the named insured and the omnibus insured and their respective employees. Here, however, I must determine what path the Montana Supreme Court would take in light of all that has been written by many courts."
>
> "Nothing is to be gained by reviewing any authorities. (Citations omitted) It

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2/ cf. Western Cas. & Sur. v. Intern. Spas of Ariz. 130 Ariz. 76, 634 P.2d 3 (Ariz.App.1981) "Accordingly, the duty to defend should focus on the facts rather than upon allegations of the ultimate determination of liability." (634 P.2d at 6)

> is sufficient to note that there is an rreconcilable conflict which has existed for many years and which has been widely advertised in the insurance community."
>
> * * *
>
> "I suppose that a writing is ambiguous when different persons looking at it in the light of its purpose cannot agree upon its meanings. The history of these insurance clauses in the courts convinces me that they are ambiguous; they are susceptible of two interpretations. The real fact of this diversity of opinion between courts and within courts overcomes the conclusions that I would reach where I left alone with nothing but the words of the policy to consider. This demonstrable difference of opinion, I believe, would be persuasive with the Supreme Court of Montana as it was with the Supreme Court of Oregon."
>
> "Since these clauses are ambiguous -- are susceptible to two meanings -- that meaning which is favorable to the insured should be adopted under the law of Montana." (Footnotes omitted.)

The distinction made by the Court below in footnote 2 that: "[A]s Walker is a federal and not a state court decision, the court below was not bound by its ruling and it does not affect our standard of review in this case[.]" is certainly unclear and appears contradictory to Judge Smith's opinion in a

diversity case involving the interpretation of an insurance policy under Montana law.

On the main question, the particular exclusions and the determination of ambiguity, the Ninth Circuit Opinion is devoid of any type of judicial or scholarly approach. While a majority of the decided cases are cited in the Opinions of the District Court and the Court of Appeals, there is no consideration given by the Court of Appeals to the diversity of opinions from court to court. Where courts differ internally, Haugan v. Home Indemnity Company, 86 S.Dak.406, 197 N.W.2d 18 (S.Dak. 1972) dissenting opinion, Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 405 A.2d 788 (S.Ct. N.J.1979) dissenting opinion,[3/] and where

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3/ PASHMAN, J., dissenting. "I respectfully dissent. While the majority's analysis of the pertinent provisions of the insurance policy is not without appeal and likely constitutes the interpretation that would be given this contract by a legal scholar well-versed in insurance law, in my opinion these provisions are clearly ambiguous from the viewpoint of the average consumer of CGL coverage. Consequently, I would hold that in the present case the carrier is liable for any sums which its insured is ultimately deemed to owe to the plaintiff. . . ."

Supreme Courts are overruling and disapproving decisions of intermediate appellate courts, Indiana Ins. Co. v. DeZutti; 408 N.E.2d 1275 (S.Ct.Ind.1980) Weedo v. Stone-E-Brick, Inc., supra; LaMarche v. Shelby Mutual Ins. Co., ___Fla___, 390 So.2d 325 (Sup.Ct.Fla.1980) there is such a divergence of opinion as to require a federal construction which will resolve the conflicting interpretations. These conflicting interpretations include such cases as B.A. Green Construction Co., Inc. v. Liberty Mutual Insurance Co., 213 Kan.393, 517 P.2d 563 (Sup.Ct.Kan.1973) which follows the authority enunciated in Haugan v. Home Indemnity Company, supra, 86 S.Dak.406, 197 N.W.2d 18 (S.Dak. 1972) but ultimately holds that there would be coverage afforded under exclusion (k) as follows:

> "Green further argues he has coverage under exclusion (k) if coverage is prohibited by exclusion (m). As we construe exclusion (k) it provides coverage only if the insured's work or product actively malfunctions and causes damage to property other than insured's work product. (Haugan v. Home Indemnity Company, supra.)"

A consideration of exclusion (k) although fully briefed and agrued in both courts below was not even mentioned by either court.

Two Second Circuit cases cited to, and disregarded by, the Court below deal with ambiguity and construction against the party creating the ambiguity. These cases, Vargas v. Insurance Company of North America, 651 F.2d 838 (2nd Cir.1981) and Filos, Bullard and Smyth v. Insurance Company of North America, 605 F.2d 598 (2nd Cir.1978) are important in that they construe ambiguity under New York law, which is the same as Montana law and the law of every other jurisdiction, in a manner most favorable to the insured. Walker v. Fireman's Fund, supra, 268 F.Supp. 899, 902 (D.Mont.1967). The opinion of the Court below ignores this entire theory set forth in careful briefing analysis based upon valid precedent. See Aid Insurance Services, Inc. v. Mel Geiger d/b/a Mel's Concrete Construction, __N.Dak.___, 294 N.W.2d 411 (Sup. Ct.N.Dak.1980) as follows:

"We conclude that uncertainty does exist in the present case and the language of exclusion (a) is susceptible to a construction which will impose liability on the insurer, Aid Insurance, and afford coverage to the insured, Geiger. The coexistence of exclusionary provisions (a) and (o) creates, at the very least, an ambiguity which must be resolved in favor of the insured so as to provide coverage. Insurance contracts are unipartite in character. They are drafted by company experts learned in the law of insurance. Insurance policies should be written so that an ordinary layperson, untrained in the field of insurance, can clearly understand them and know whether or not coverage is afforded. If they are not so written, the insurance company must assume the consequences of the ambiguity and resulting confusion.

We say this fully cognizant of the conflicting decisions of the various jurisdictions which have construed identical or comparable provisions." (Citations omitted)"

Finally, all of the cases based upon the approach taken by Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 405 A.2d 788 (S.Ct.N.J.1979) which was adopted by the District Court and affirmed by the Court below, are premised upon the construction of policy language first enunciated by an insurance publication. A copy of the article "Comprehensive General Liability

Insurance - Perspective and Overview" by George H. Tinker was provided to the Court below. The face sheet of this article from 25 Federal Insurance Counsel Quarterly, Spring, 1979, is reproduced in the Appendix and illustrates that the Courts following Weedo have construed these exclusions in a manner most favorable to the insurance carriers as first defined by the Associate General Counsel of the Kemper Insurance Companies.4/

4/ Weedo v. Stone-E-Brick, Inc., 81 N.J.233, 405 A.2d 788 (S.Ct.N.J.1979) supra at p. 795: "As a variant of its argument that exclusion '(a)' grants the coverage it seeks, Stone-E-Brick contends that this exception, when read in conjunction with the 'business risk' exceptions, is confusing in that coverage 'granted' by the former clause is taken away by the latter two. 155 N.J.Super. at 486, 382, A.2d 1152. But this argument too ignores the principle that

> '[e]ach exclusion is meant to be read with the insuring agreement, independently of every other exclusion. The exclusions should be read seriatim, not cumulatively. If any one exclusion applies there should be no coverage, regardless of inferences that might be argued on the basis of exceptions or qualifications contained in other exclusions. There is no instance in which an exclusion can properly be regarded as inconsistent with another exclusion, since they bear no relationship with one another.' [Tinker, op. cit., supra., 25 Feder.Ins.Couns.Q. at 223.]"

3. THE INSURANCE INDUSTRY IS SO INFUSED WITH OVERRIDING PUBLIC RESPONSIBILITY AS TO REQUIRE A DEFINITIVE CONSTRUCTION OF OFT LITIGATED AND DIVERGENTLY INTERPRETED STANDARD POLICY PROVISIONS.

Apart from a consideration of the troubled construction industry, Issue 1, supra, consideration should be given to the importance of the insurance industry as a whole. While the property of 60 unit owners has been affected by the outcome of this case, everyone, in their daily lives, comes into contact with some aspect of the insurance industry.

Whether we are dealing with our homes, our automobiles, our health or our lives, each of us must deal with the vagaries and complexities of policy language contained in insurance contracts. Although this case involves only one area of this vitally important service industry, it is an area which has primary concern to the vast construction industry and important secondary concern to the public in general as purchasers of potentially defective houses, shops and businesses. The diversity of opinion in an area so fundamental

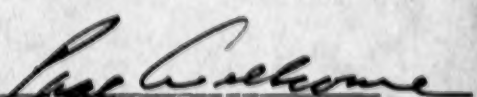
to public endeavors, whether we be the Federal government, builders or homeowners, requires a far reaching and searching examination of this most basic insurance coverage question.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully Submitted,

WELLCOME & FROST, P.S.C.

By 

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I am a member of the bar of the Supreme Court of the United States and have this 14th day of January, 1983, within the time permitted by the Revised Rules of the Supreme Court of the United States, deposited in a United States Post Office, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, forty (40) copies of the Petition for Writ of Certiorari.

I further certify that I have on the same date served the Petition for Writ of Certiorari upon all parties by causing three (3) copies thereof to be sent by first class United States mail, postage prepaid, to the offices of their attorneys as listed below:

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Subscribed and sworn to before me, a Notary Public for the State of Montana, this 14th day of January, 1983.

Notary Public
Residing at Bozeman, Montana
My Commission expires 2/9/85

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STILLWATER CONDOMINIUM ASSOCIATION,

Appellant,

vs.

AMERICAN HOME INSURANCE COMPANY, and FIREMAN'S FUND INSURANCE COMPANY,

Appellees.

No. 81-3207

D.C.No.CV-79-50-BU

MEMORANDUM

FILED
August 6, 1982

Appeal from the United States District Court
for the District of Montana
W.D. Murray, Senior District Judge, Presiding
Argued and Submitted June 7, 1982

Before: CHOY, TANG and BOOCHEVER, Circuit Judges.

Stillwater Condominium Association appeals from summary judgment in favor of American Home Assurance Company. The first issue is whether the district court erred in concluding that policy exclusions (l) and (m) excluded the appellant's losses. Stillwater contends that exclusions (l) and (m) are ambiguous if read together with exclusion (a), and that the district court was obliged to resolve this ambiguity in favor of coverage. The district court ruled that,

under Montana law, insurance policy exclusions cannot create coverage and that exclusion (a)'s language therefore did not expand the meaning of exclusions (l) and (m).

We review a district court's interpretation of contract language de novo if the district court relies on state law which offers only "general guidance." Insurance Co. of North America v. Howard, No. 80-3425, slip op. at 2419 (9th Cir. June 7, 1982). While no Montana state court has addressed whether insurance policy exclusions may be construed to create coverage, a substantial majority of the courts that have examined policy exclusions similar to exclusions (l) and (m) have denied coverage on substantially the same grounds as cited by the district court.[1/] The reasons offered by the district court persuade us that the district court was correct in anticipating that the Montana Supreme Court would follow this majority rule.

Stillwater also argues that the conflict between the courts in interpreting these exclusions is by itself sufficient to compel a finding of ambiguity. The district court disagreed, ruling that under Montana law such conflict does not conclusively demonstrate ambiguity. No Montana court has reached this issue. We acknowledge that several courts in other jurisdictions have ruled that split judicial authority establishes ambiguity per se.[2/] The prevailing view, however, is that such conflict is only evidence of ambiguity or is irrelevant.[3/] Absent contrary Montana state court authority, we agree with the district court's reasoning and conclude that the Montana Supreme Court would follow this majority rule.

Stillwater next claims that even if the district court's interpretation of the exclusions is upheld, the duty to defend was breached because Stillwater's action claimed damages not controlled by the exclusions. We disagree. Under Montana law, courts look

to the allegations in the complaint to determine whether an accident is covered and whether there is a duty to defend. See, e.g., State Farm Mutual Insurance Co. v. Leary, 544 P.2d 444, 448 (Mont.1975); Atcheson v. Safeco Insurance Co., 527 P.2d 549, 552 (Mont.1974). Aside from defects in the condominium structures, the only harm alleged in Stillwater's complaints is the loss of rental value. Conceptually, this is only another aspect of the defect in the product. Stillwater cites no authority and offers no argument suggesting otherwise. Thus, liability is excluded under exclusions (l) and (m).

Stillwater also relies upon a deposition in which there is an isolated reference to water damage to one of the condominium owner's furniture. As this damage was not alleged in either of Stillwater's complaints, the district court was not required to consider this allegation in deciding the coverage issue.

AFFIRMED.

FOOTNOTES

1/ See Biebel Bros., Inc. v. U.S. Fidelity & Guarantee Co., 522 F.2d 1207, 1209-12 (8th Cir.1975) (Missouri law); United States Fire Insurance Co. v. Colver, 600 P.2d 1, 3-4 (Alaska 1979); St. Paul Fire & Marine Insurance Co. v. Coss, 80 Cal.App.3d 888, 895-96, 145 Cal.Rptr. 836, 839-41 (1978); LaMarche v. Shelby Mutual Insurance Co., 390 So.2d 325, 326 (Fla.1980); Indiana Insurance Co. v. DeZutti, 408 N.E.2d 1275, 1278-79 (Ind. 1980); Tiano v. Aetna Casualty & Surety Co., 102 Mich.App. 177, ____, 301 N.W.2d 476, 478-80 (1980); Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, ____, 405 A.2d 788, 791-96 (1979); Haugan v. Home Indemnity Co., 86 S.D. 406, ____, 197 N.W.2d 18, 20-22 (1972); Vernon Williams & Son v. Continental Insurance Co., 51 S.W.2d 760, 762-64 (Tenn.1979). But see Federal Insurance Co., v. P.A.T. Homes, Inc., 113 Ariz. 136, 139, 547 P.2d 1050, 1052-53 (1976); Fresard v. Michigan Millers Mutual Insurance Co., 97 Mich.App. 584, ____, 296 N.W.2d 112, 113-15 (1980); Commercial Union Assurance Co. v. Gollan, 118 N.H.744, ____, 394 A.2d 839, 841-42 (N.H. 1978); AID Insurance Service, Inc. v. Geiger, 294 N.W.2d 411, 413-15 (N.D.1980).

2/ See Alliance Life Insurance Co. v. Ulysses Volunteer Fire Relief Ass'n, 215 Kan.937, ____, 529 P.2d 171, 180 (1974); Alvis v. Mutual Benefit Health & Accident Ass'n, 201 Tenn. 198, ____, 297 S.W.2d 643, 645-46 (1956). A different Montana federal district judge has apparently also endorsed this view. See Walker v. Fireman's Fund Insurance Co., 268 F.Supp. 899, 901 (D.Mont.1967). As Walker is a federal and not a state court decision,

the court below was not bound by its ruling and it does not affect our standard of review in this case.

3/ See Trinity Universal Insurance Co. v. Robert P. Stapp, Inc., 278 Ala.209, ____, 177 So.2d 102, 105 (Ala.1963); Crim v. National Life & Accident Insurance Co., 605 S.W.2d 73, 77 (Mo.1980); Breed v. Insurance Co. of North America, 46 N.Y.2d 351, 355, 385 N.E.2d 1280, 1283, 413 N.Y.S.2d 352, 355-56 (1978); Jones v. Insurance Co. of North America, 264 Or.276, ____, 504 P.2d 130, 133 (1972). Several Arizona decisions also support this proposition, but contrary Arizona authority exists. Compare Manning v. Summit Home Insurance Co., 128 Ariz. 79, 81-82, 623 P.2d 1235, 1237 (Ct.App.1980) (no per se rule) and Hampton v. Allstate Insurance Co., 126 Ariz. 403, 405, 616 P.2d 78, 80 (Ct.App.1980) (same) with Federal Insurance Co. v. P.A.T. Homes, Inc., 113 Ariz. 136, 138-39, 547 P.2d 1050, 1052-53 (1976) (apparently endorsing per se standard).

AFFIRMED.

FOOTNOTES

1/ See Biebel Bros., Inc. v. U.S. Fidelity & Guarantee Co., 522 F.2d 1207, 1209-12 (8th Cir.1975) (Missouri law); United States Fire Insurance Co. v. Colver, 600 P.2d 1, 3-4 (Alaska 1979); St. Paul Fire & Marine Insurance Co. v. Coss, 80 Cal.App.3d 888, 895-96, 145 Cal.Rptr. 836, 839-41 (1978); LaMarche v. Shelby Mutual Insurance Co., 390 So.2d 325, 326 (Fla.1980); Indiana Insurance Co. v. DeZutti, 408 N.E.2d 1275, 1278-79 (Ind. 1980); Tiano v. Aetna Casualty & Surety Co., 102 Mich.App. 177, ____, 301 N.W.2d 476, 478-80 (1980); Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, ____, 405 A.2d 788, 791-96 (1979); Haugan v. Home Indemnity Co., 86 S.D. 406, ____, 197 N.W.2d 18, 20-22 (1972); Vernon Williams & Son v. Continental Insurance Co., 51 S.W.2d 760, 762-64 (Tenn.1979). But see Federal Insurance Co., v. P.A.T. Homes, Inc., 113 Ariz. 136, 139, 547 P.2d 1050, 1052-53 (1976); Fresard v. Michigan Millers Mutual Insurance Co., 97 Mich.App. 584, ____, 296 N.W.2d 112, 113-15 (1980); Commercial Union Assurance Co. v. Gollan, 118 N.H.744, ____, 394 A.2d 839, 841-42 (N.H. 1978); AID Insurance Service, Inc. v. Geiger, 294 N.W.2d 411, 413-15 (N.D.1980).

2/ See Alliance Life Insurance Co. v. Ulysses Volunteer Fire Relief Ass'n, 215 Kan.937, ____, 529 P.2d 171, 180 (1974); Alvis v. Mutual Benefit Health & Accident Ass'n, 201 Tenn. 198, ____, 297 S.W.2d 643, 645-46 (1956). A different Montana federal district judge has apparently also endorsed this view. See Walker v. Fireman's Fund Insurance Co., 268 F.Supp. 899, 901 (D.Mont.1967). As Walker is a federal and not a state court decision,

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

STILLWATER CONDOMINIUM ASSOCIATION, No. CV-79-50-Bu

Plaintiff,

vs.

AMERICAN HOME ASSURANCE COMPANY, a New York corporation; and FIREMAN'S FUND INSURANCE COMPANY, a California corporation,

Defendants.

MEMORANDUM AND ORDER

This diversity action is for declaratory judgment to determine the rights of the parties under a comprehensive general liability (CGL) insurance policy and an umbrella liability policy. Land developer Big Sky of Montana, Inc. (Big Sky), purchased the CGL policy from American Home Assurance Company (American Home) and the umbrella liability policy from Fireman's Fund Insurance Company. The damages which plaintiff contends are covered by the liability policies arise out of a civil action in a Montana district court (the Stillwater action).

The facts of the Stillwater action are as follows. Big Sky built and marketed the Stillwater condominiums in the highly scenic Big Sky Resort area. The purchasers of the condominiums, as the Stillwater Condominium Association, brought suit against Big Sky to recover damages for faulty workmanship because the condominiums were poorly constructed. Just a few of the indicia of that poor construction were leaking roofs, delaminating siding, and improperly installed wiring and plumbing.

Big Sky tendered defense of the Stillwater action to American Home. American Home refused to defend, contending that a CGL policy does not provide coverage for the allegations of the Stillwater action. That action ultimately settled, and the Stillwater Condominium Association acquired through that settlement "[a]ll rights, title, and interest in any and all insurance policies procured by Big Sky of Montana, Inc., which would or could provide insurance coverage for the damages

alleged...." This court must determine whether American Home had a duty to defend.

In the Stillwater action the Stillwater Condominium Association alleged breach of express warranty, breach of implied warranty, breach of contract, strict liability in tort, and negligence. Under Montana law an insurer has a duty to defend if the complaint alleges facts, which if proven, would result in coverage. Atcheson v. Safeco Ins. Co., 527 P.2d 549, 552 (Mt.1974). The facts alleged in the Stillwater action constitute faulty workmanship. The damages sought there are for repair or replacement or that faulty workmanship, i.e. repair of the condominiums themselves. Whether those damages are covered by the CGL policy controls whether American Home had a duty to defend in the Stillwater action.

Whether a CGL policy covers an insured's failure to perform in a workmanlike manner, where as here the faulty work product constitutes the basis for damages, has split those jurisdictions which have resolved the

issue. The majority find no coverage and no duty to defend under facts analogous to those in the instant case.[1] This court joins that majority in so holding based upon the following discussion.

The pertinent policy language in the American Home policy is:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> A. bodily injury or
>
> B. property damage
>
> to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations in the suit are goundless, false or fraudulent, and may make such investigation and settlement of any claim or suit it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgment or settlements. (emphasis added)
>
> EXCLUSIONS
>
> This insurance does not apply:
>
> (a) to liability assumed by the insured

> under any contract or agreement except an incidental contract; but this exclusion does not apply to a warranty of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner; (emphasis added)...
>
> (l) to property damage to the named insured's products arising out of such products or any part of such products;
>
> (m) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith; ....

Plaintiff urges that the exception to exclusion (a), "but this exclusion does not apply to a warranty of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner;" should be construed to grant coverage for the occurrences alleged in the Stillwater action. In the alternative plaintiff argues that the exception to exclusion (a), when read in conjunction with exclusions (l) and (m), creates an ambiguity in the contract which must be construed in favor of coverage.

I. Whether the exception to exclusion (a) grants coverage for repair of faulty work products.

Plaintiff relies upon Applegren v. Milbank Mutual Ins. Co., 268 N.W.2d 114 (N.D.1978), in arguing that the exception to exclusion (a) grants coverage for the occurrences of the Stillwater action. Focusing on exclusion (a), and emphasizing the language, "this exclusion does not apply to a warranty of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner," Id. at 116, the Applegren court simply held that the exception to exclusion (a) "clearly means that the policy covered and applied to the insured's warranties that the work would be performed in a workmanlike manner." Id. at 118. Applegren, however, stands alone in finding coverage based only on the language in the exception to exclusion (a).[2/]

Further, plaintiff's argument is unpersuasive because it overlooks the "all-

risk" nature of the CGL policy. All-risk means that all insurable, fortuitous events resulting in legal liability to the insured are covered, save those occurrences specifically excluded in the policy. The occurrences of the Stillwater action, therefore, would be covered by the CGL policy if that policy contained no applicable exclusions. That policy does contain applicable exclusions however; at issue here are exclusions (a), (l), and (m). Exclusion (a) excludes from the broad all-risk coverage, "liability assumed by the insured under any contract or agreement except an incidental contract." The exclusion goes on, in the exception to exclusion (a), to bring back within the all-risk coverage, i.e. within the insuring provision, "a warranty of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner." Were there no other exclusions to operate on the broad coverage of the insuring provision, the

allegations of the Stillwater action, if proven, would be covered and American Home would have had a duty to defend. There are additional exclusions, however, which further limit the insuring provision, specifically exclusions (l) and (m). Plaintiff would have the court ignore exclusions (l) and (m) and hold that coverage is granted simply by the exception to exclusion (a). The court, however, cannot ignore exclusions (l) and (m) which uniformly have been held straightfoward and unambiguous in eliminating coverage for repair or replacement of the insured's own faulty work. E.g., Weedo v. Stone-E-Brick, Inc., 405 A.2d 788, 794 (N.J.1979), (citations omitted); Haugan v. Home Indemnity Company, 197 N.W.2d 18, 22 (S.D.1972) (citations omitted).

II. Whether exclusions (a), (l) and (m) create an ambiguity which must be resolved in favor of coverage.

The New Hampshire Supreme Court in Commercian Union Assur. Co. v. Gollan, 394 A.2d 839 (N.H.1978), found exclusion (a) and

the business risk exclusions ambiguous, and imposed coverage for the insured's liability to rebuild the roof on a home built by the insured after it had collapsed. Basically, the Gollan court embraced the contention made here by plaintiff that exclusion (a) contradicts the business risk exclusions by granting coverage for warranty of fitness, thereby creating an ambiguity which must be resolved in favor of coverage. To reemphasize, however, the exclusion clauses do not grant coverage; exclusions limit the scope of coverage granted in the insuring agreement. E.g., Weedo v. Stone-E-Brick, Inc., 405 A.2d 788 (N.J.1979). Each exclusion refers to the hazards insured against in the coverage paragraph, St. Paul Fire & Marine Ins. Co. v. Coss, 80 Cal.App.3d 888, 896, 145 Cal.Rptr. 836, 841 (Cal.Ct.App.1978), and not to the other exclusions; exclusions are to be read "with the insuring agreement, independently of every other exclusion." Weedo, 405 A.2d at 795 (citation omitted).

Further, the Weedo analysis is consistent with the all-risk nature of the CGL policy. To reiterate, the facts alleged in the Stillwater action are within the coverage of the insuring agreement standing alone. The exception to exclusion (a) preserved that coverage and brings it back within the broad all-risk coverage of the insuring agreement. Exclusions (l) and (m), the business risk or work product exclusions, however, remove the occurrences of the Stillwater action from the coverage granted by the insuring provision. The occurrences of the Stillwater action are not covered because the condominiums which are the basis of the damage are "the named insured's products" (exclusion (l)), and "work performed by or on behalf of the named insured" (exclusion (m)).

Additionally, the language "to which this insurance applies" provides notice that some occurrences resulting in damage simply are not covered. Thereafter, each exclusion further defines and limits the coverage pro-

vided. The faulty workmanship resulting in damages to the Stillwater condominiums, in the general sense may be property damage, but is not as stated in the CGL policy "property damage to which this insurance applies." Moreover, the language used in the exception to exclusion (a) that "this exclusion does not apply to..." provides further notice that other exclusions may and do indeed further limit the coverage granted in the insuring provision.

Plaintiff, however, urges the following analysis. The exception to exclusion (a) "grants" coverage for the occurrences of the Stillwater action. Exclusions (l) and (m) (the business risk exclusions) take away, or are in juxtaposition with, the coverage "granted" in the exception to exclusion (a). Therefore ambiguity arises and coverage results. See, e.g. Commercial Union Assur. Companies v. Gollan, 394 A.2d 839, 842 (N.H. 1978). This analysis, however, is inapposite because the coverage supposedly "granted" by

the exception to exclusion (a) has already been granted in the insuring provision. Having been granted in the insuring provision, that coverage is subject to the limitation of each and every exclusion.

In sum, this court finds no ambiguity in the CGL policy provisions here at issue.

> It is one thing to construe an ambiguity, and it is quite another manner to create one. The terms of the insurance policy should be given a practical and reasonable construction which support (sic) the intent of the parties. The court should not attempt to revise the policy to increase the risk or extend liability just to accomplish a so-called good purpose. Stearns-Roger Corp. v. Hartford Acc. & Indem. Co., 571 P.2d 659, 662 (Ariz.1977) (citations omitted).

The court will not glean the exclusions and apply exceptions where application is not meant or proper just to create an "ambiguity." To read out of the CGL policy the business risk exclusions which uniformly have been held as unambiguous is to give neither a reasonable nor a practical construction to the policy's terms.

III. Whether because jurisdictions disagree as to the ambiguity of exclusions (a), (l) and (m), those exclusions are ambiguous as a matter of law.

Plaintiff relies upon Federal Insurance Company v. P.A.T. Homes, Inc., 547 P.2d 1050, 1052 (Ariz.1976), in arguing that "where various jurisdictions reach different conclusions as to the meaning, intent, and effect of the language of an insurance contract ambiguity is established." The essence of plaintiff's argument is that where courts disagree whether certain language is ambiguous, that language must therefore be ambiguous. Plaintiff's logic is not universally sound. That several jurisdictions disagree as to the meaning of the language might indicate genuine ambiguity. Regarding the instant issue, however "ambiguity" results only from a forced construction of the policy language. There being no genuine ambiguity then, ambiguity as a matter of law is moot.

Additionally, this court wonders even in those cases where legitimate, differing inter-

pretations of the same language result, at what point the language becomes ambiguous as a matter of law. Is that point reached when the jurisdictions are split evenly, when there is a 40%, 30% or 20% minority; or can a court no longer consider the issue for itself when only one other court reaches an opposite conclusion? This court prefers the alternative which allows each court to decide the issue in light of the policy terms and the facts before it.

IV. Conclusion.

For all of these reasons this court will not indulge in a forced construction of the CGL policy just to impose coverage. This court reaches the same conclusion regarding the umbrella liability coverage issued by Fireman's Fund Insurance Company because that policy has the same exclusions as has the American Home CGL policy. Because there is no coverage under these policies, American Home had no duty to defend in the Stillwater action.

THEREFORE, IT IS ORDERED and this does order that defendants' motion for summary judgment is hereby granted.

IT IS FURTHER ORDERED that all other motions before the court are denied.

Done and dated this 3rd day of March, 1981.

/s/ W.D. Murray
W.D. Murray
Senior United States
District Judge.

FOOTNOTES

1/ The four jurisdictions which have found coverage or a duty to defend are Arizona, Michigan, New Hampshire, and North Dakota. See Commercial Union Assur. Companies v. Gollan, 394 A.2d 839 (N.H.1978); Applegren v. Milbank Mut. Ins. Co., 268 N.W.2d 114 (N.D. 1978); Federal Insurance Company v. P.A.T. Homes, Inc., 547 P.2d 1050 (Ariz.1976); Fresard v. Michigan Millers Mut. Ins. Co., 296 N.W.2d 112 (Mich.Ct.App.1980), appeal docketed, No. 46110 (Mich.S.Ct. May 29, 1980).

The eight jurisdictions which have found no coverage and no duty to defend are Alaska, California, Florida, Indiana, Missouri, New Jersey, South Dakota and Tennesse. See Biebel Bros., Inc. v. United States Fidelity & G. Co., 522 F.2d 1207 (8th Cir.1975) (construing Missouri law); Indiana Ins. Co. v. DeZutti, 408 N.E.2d 1275 (Ind.1980); Shelby

Mutual Insurance Company v. LaMarche, 371 So. 2d 198 (Fla.Ct.App.1979), aff'd. No. 57,094, slip op. (Fla.S.Ct. July 10, 1980); Vernon Williams & Son v. Continental Ins. Co., 591 S.W.2d 760 (Tenn.1979); U.S. Fire Ins. Co. v. Colver, 600 P.2d 1 (Alaska 1979); Weedo v. Stone-E-Brick, Inc., 405 A.2d 788 (N.J. 1979); St. Paul Fire & Marine Ins. Co. v. Coss, 80 Cal.App.3d 888, 145 Cal.Rptr. 836 (Cal.Ct.App.1978); Haugan v. Home Indemnity Company, 197 N.W.2d 18 (S.D.1972).

2/ "We conclude that under paragraph (a) of the policy set out earlier herein, Milbank was obligated to defend. The amended complaint clearly stated allegations which come within the terms of paragraph (a) of the insurance policy. We reach this conclusion without taking into consideration any of the provisions of paragraph (k), which we believe are ambiguous." Id. at 119. (emphasis added)

UNITED STATES DISTRICT COURT
for the
DISTRICT OF MONTANA - BUTTE DIVISION

STILLWATER CONDOMINIUM ASSOCIATION, No. CV-79-50-BU

Plaintiff,

vs.

AMERICAN HOME ASSURANCE COMPANY, a New York corporation; and FIREMAN'S FUND INSURANCE COMPANY, a California corporation,

Defendants.

JUDGMENT

This action came on for hearing before the Court, Honorable W. D. Murray, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that defendants' motion for summary judgment is granted, and judgment is entered in favor of the defendants.

IT IS FURTHER ORDERED that all other motions before the court are denied.

Dated at Butte, Montana, this 6th day

March, 1981.

Lou Aleksich, Jr.
Clerk of Court

By Doreen F. Hugo,
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STILLWATER CONDOMINIUM ASSOCIATION,

Appellant,

vs.

AMERICAN HOME INSURANCE COMPANY, and FIREMAN'S FUND INSURANCE COMPANY,

Appellees.

No. 81-3207

ORDER

Before: CHOY, TANG and BOOCHEVER, Circuit Judges.

The court has considered the appellant's Petition for Rehearing. The Petition for Rehearing is denied.

FILED: October 21, 1982

Phillip B. Winberry, Clerk
United States Court of Appeals

Comprehensive General Liability Insurance—Perspective and Overview

GEORGE H. TINKER*

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No. 82-1190

Supreme Court of the United States

October Term, 1982

STILLWATER CONDOMINIUM ASSOCIATION,

Petitioner,

vs.

AMERICAN HOME ASSURANCE COMPANY and FIREMAN'S FUND INSURANCE COMPANY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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PREFACE

By this Brief, respondents oppose the issuance of a Writ of Certiorari to review the decision of the Ninth Circuit Court of Appeals affirming the opinion of the Honorable W. D. Murray, Montana Senior United States District Judge, which granted a Summary Judgment to respondents in a Declaratory Judgment action determining the rights of parties under a comprehensive general liability insurance policy.

STATEMENT OF THE CASE

For clarification, it should be noted that Big Sky of Montana, Inc., and Chrysler Realty Corporation, the named insured in a comprehensive general liability policy, issued by respondents, were originally sued by Stillwater Condominium Association for damages resulting from structural defects in a

condominium built and sold by Big Sky to members of the Stillwater Association. That underlying action was settled in part by an assignment to Stillwater of Big Sky's interest in the comprehensive general liability policy issued by respondents. The instant litigation is a Declaratory Judgment action brought to determine coverage for those resulting damages. Both the Federal District Court in Montana and the Ninth Circuit Court of Appeals found no coverage and no duty to defend, and it is the latter Court's decision which this Court is asked to review by certiorari.

ARGUMENT

1. THE OPINION OF THE NINTH CIRCUIT COURT OF APPEALS IS NOT DEFICIENT.

On appeal below, three issues were tendered to the Circuit Court and all three were succinctly but thoroughly

decided by that Court. The first issue was whether an exception to an exclusion clause created coverage to the insured. In concluding that there was neither coverage nor a duty to defend, the Circuit Court cited all of the reported cases, both state and federal, deciding the question; and, like the opinion of the district court, followed the majority denying coverage.

On a second issue, petitioner argued that the divergence between the majority and minority opinions itself raises an ambiguity in the policy which ought to be resolved in the insured's favor; but again the Circuit Court canvassed the reported decisions and, agreeing with the majority, concluded that a "split of judicial authority" does not establish an ambiguity per se.

Third, petitioner submitted that

the loss of rental income was a property damage distinct from structural injury to the insured's product, but the Circuit Court disagreed, saying:

> "Conceptually, this is only another aspect of the defect in the product. Stillwater cites no authority and offers no argument suggesting otherwise. Thus, liability is excluded under exclusions (l) and (m)."

Finally, petitioner, as a basis to establish the insurer's duty to defend, referred to a deposition of one of the condominium owners who claimed water damage to the bottom of his dresser. Significantly, the deposition was taken before the deponent became a party by the amendment inaugurating the class action and that amendment did not include personal property injury as an element of damage. Appropriately, the Circuit Court first looked to Montana law for guidance and found in *Atcheson v. Safeco*

Insurance, 165 Mont. 239, 527 P.2d 549, 552 (1974), this direction:

> "It is to the allegations of the Alaskan complaint that we looked to determine whether or not there is a duty to defend. The appellant has a duty to defend where the complaint sets forth facts which are a part of the covered risk."

Here, of course, the complaint, even as twice amended, does not include damage to personal property of others as a claimed element of damage. Accordingly, the Circuit Court concluded:

> "Stillwater also relies upon a deposition in which there is an isolated reference to water damage to one of the condominium owner's furniture. As this damage was not alleged in either of Stillwater's complaints, the district court was not required to consider this allegation in deciding the coverage issue."

In summary, it is patently evident from the Opinion itself that the Ninth Circuit Court thoroughly considered each and every contention advanced by

petitioner, researched and recorded all of the applicable law, and correctly and finally concluded that the district court was right in granting a Summary Judgment to respondents. There simply are no defects in the Circuit Court's Opinion; but, to the contrary, the Opinion is a thorough searching analysis of all of petitioner's contentions.

2. THERE IS NO CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS OR WITH PRIOR NINTH CIRCUIT DECISIONS.

The only other Circuit Court which has considered the principal coverage issue involved in the instant action is *Biebel Bros., Inc. v. United States Fidelity and Guaranty Co.*, 522 F.2d 1207 (8th Cir., 1975) and that decision is not contrary but, rather, is in complete accord with the Ninth Circuit's opinion. The *Biebel* decision reads in part:

> "Appellee seeks to avoid the effects of the clear language of exclusions (l) and (m) by calling our attention to exclusion (a) which provides that the insurance does not apply to: '* * * liability assumed by the *Insured* under any contract or agreement except an *incidental contract*; but this exclusion *does not apply to a warranty of fitness or quality of the Named Insured's product or a warranty that the work performed by or on behalf of the Named Insured shall be done in a workmanlike manner.*' [Final emphasis supplied.] Appellee notes the exception and argues that it would be unnecessary if the legal obligation of the insured were not based upon a breach of warranty. It fails to recognize that this language is limited to exclusion (a) and has no application whatsoever to exclusions (l) or (m) or the others here under scrutiny."

Obviously, the *Biebel* case was correctly cited by the Ninth Circuit as a leading case following the now-clear majority rule adopted by the Ninth Circuit. There is, clearly, no conflict here.

However, petitioner's counsel also points to the Ninth Circuit Court Opinion in *St. Paul Fire & Marine Insurance Co. v. Sears Roebuck and Company*, 603 F.2d 780 (9th Cir., 1979) as a contrary holding. That former decision simply found coverage for injury to property of others than the insured, but this action was initiated by the insured seeking coverage for damage to its own product, to wit: the defective condominiums it built. This, of course, is the distinguishing feature between the two cases.

Finally, the Circuit Court is accused by petitioner of failing to give "a federal construction which will resolve the conflicting interpretations." Of this accusation, suffice it to say that the decision of the Circuit Court of the Ninth Circuit is now recorded as in agreement with the ever-increasing

majority and is contrary to the shrinking minority. To this extent, at least, it adds stature to the majority and, thereby, helps to rectify the conflict upon which petitioner has so long survived.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals being neither defective nor in conflict with its own decisions or those of other Circuit Courts of Appeal, the Petition for a Writ of Certiorari to review that decision should be denied.

RESPECTFULLY SUBMITTED this 14th day of February, 1983.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States and have, on the 14th day of February, 1983, within the time permitted by the Revised Rules of the Supreme Court of the United States, deposited in a United States Post Office, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, forty (40) copies of the respondents' Brief in Opposition to Issuance of a Writ of Certiorari.

I further certify that I have on the same date served a copy of the Brief in Opposition to Issuance of a Writ of Certiorari upon all parties by causing three (3) copies thereof to be sent by first class United States mail, postage prepaid, to the offices of their

attorneys as listed below:

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SUBSCRIBED AND SWORN to before me, a Notary Public for the State of Montana, residing at Manhattan, Montana, this 4th day of February, 1983.

_____
Notary Public, State of Montana
Residing at Manhattan, Montana
My Commission Expires: Nov. 6, 1984